Supreme Court, U. S.
FILED
JUN 21 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

77-1669

NO. TERM, 1978

RALPH G. FAZIO and MARY G. FAZIO,
Petitioners

v.

ZONING HEARING BOARD OF EAST MARLBOROUGH TOWNSHIP,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

BRIEF FOR EAST MARLBOROUGH TOWNSHIP IN OPPOSITION

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(Statutes and Other Authorities)

Constitution of the United States, Amendment XIV, §1

QUESTION PRESENTED

WHETHER CERTAIN PROVISIONS OF THE ZONING ORDINANCE OF EAST MARLBOROUGH TOWNSHIP, CHESTER COUNTY, PENNSYLVANIA REQUIRING GREATER SETBACKS AND SIDE YARDS FOR MUSHROOM PLANTS THAN FOR OTHER USES ARE FACIALLY VIOLATIVE OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14th AMENDMENT.

STATEMENT

Petitioners are the owners of 8.943 acres of land in East Marlborough Township, Chester County, Pennsylvania. The property is used for the growing of mushrooms. Only ten percent (10%) of the land area is actually covered by buildings. The structures which are the subject of this litigation are a soil shed which is used to store soil and manure compost used in connection with the culture of mushrooms and an addition to an existing mushroom house.

The East Marlborough Township Zoning Ordinance, enacted in 1960, permits mushroom plants to be located in the residential district subject to certain

setback and side yard requirements, the purpose of which is to mitigate the special problems associated with mushroom growing operations, including the use of manure for a growing medium. The mushroom plants are required to be 250 feet from road rights-of-way and 100 feet from adjacent property lines. Certain of petitioners' mushroom growing buildings became non-conforming when this ordinance was enacted because they were located only 70 feet from the centerline of the abutting road.

On July 9, 1972 petitioners filed an application for special exception or variance to construct a soil shed and an addition to an existing

mushroom house. Both structures were to be located at a distance from the road substantially less than the required minimum. After a hearing on August 14, 1972, there followed a rather involved procedural course, which resulted, after a remand, in the affirmance by the Court of Common Pleas of Chester County of the Zoning Hearing Board's denial of special exception and variance requests, as well as its finding that the challenged ordinance provisions were not unconstitutional.

On appeal, the Commonwealth Court of Pennsylvania unanimously affirmed the lower court's decision, stating in pertinent part:

> Since neither the appellants nor the Township presented any evidence on the issue of the constitutionality of the setback requirements, our review is limited to whether the regulation is invalid on its fact.* * *.
>
> * * * As noted in Eller /v. Board of Adjustment, 414 Pa. 1, 198 A.2d 863 (1964)/, the burden of proving the unconstitutionality of a legislative enactment is on the party so asserting. * * * Absent any evidence in the record to the contrary, we cannot say the regulation here is so restrictive it presents an unreasonable and arbitrary classification. (See, Petition for Certiorari, Appendix "B-11" - "B-13.")

The Commonwealth Court clearly distinguished the instant case from Eller, supra, where the Pennsylvania Supreme Court in the same factual context had found setback requirements of 500 feet and 1,000 feet for mushroom plants to

be unreasonable and a taking of property without due process of law.

The Pennsylvania Supreme Court denied petitioners' request for allowance of appeal on February 24, 1978, without dissent.

ARGUMENT

In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), this Court reaffirmed a commodious test for the exercise of the police power for zoning purposes first set down in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) - i.e., that a municipality may restrict land uses within its boundaries as long as the regulation bears a substantial relation to the public health, safety, morals or general welfare. In restating the Euclid rule, the Court in Belle Terre emphasized that the "line 'which in this field separates the legitimate

from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.* * * If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.'" 416 U.S. at 4(citations omitted). Furthermore, in Belle Terre the Court refused to limit the concept of public welfare that may be enhanced by zoning regulations. Id., at 5.

Petitioners here do not contend that a municipality cannot use its police power to severely restrict uses where the ordinance bears a substantial relationship to the public welfare.

Rather, petitioners challenge the instant setback and side yard requirements as invalid on their face because the Township has presented no evidence either in the zoning ordinance itself or in the record that the restrictions bear some relationship to the public health, safety or general welfare.

Petitioners seek to have turned on its head the long-standing principles enunciated by this Court that the exercise of the police power is presumed constitutionally valid and that the burden on the reasonableness of the regulation is on the challenger. Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962).

A general and legally sufficient statement of purpose, that the zoning restrictions do promote the public health, safety and general welfare, is a part of the Township's zoning ordinance. It would be a strange and impossible burden for the Township to place in its ordinance "evidence", in the detail apparently demanded by petitioners, that every specific restriction bears some relationship to the public health, safety and general welfare.

Furthermore, that the record is bare with regard to the reasonableness of the regulations is due to petitioners' own failure to meet the burden of proof required. In Goldblatt, supra, this Court was faced

with a similarly inadequate record upon which to evaluate the reasonableness of a municipal regulation prohibiting further excavation below the water table in a pond already dredged to a depth of 25 feet by the appellants. In the absence of any evidence on "the nature of the menace against which /the ordinance/ will protect, the availability of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance", the Court said:

> Although one could imagine that preventing further deepening of a pond already 25 feet deep would have a de minimus effect on public safety, we cannot say that such a conclusion is compelled by facts of

which we can take notice. Even if we could draw such a conclusion, we would be unable to say the ordinance is unreasonable; for all we know, the ordinance may have a de minimus effect on appellants. Our past cases leave no doubt that appellants had the burden on 'reasonableness.' .../T/his burden not having been met, the prohibition of excavation on the 20-acre Lake tract must stand as a valid police regulation. Goldblatt, supra, at 595-596 (citations omitted).

The same clearly may be said in the present case, where petitioners have never presented evidence tending to show the unreasonable or arbitrary nature of the restrictions on mushroom plants or indeed how the petitioners will suffer by observing them.

A legislative judgment should not be set aside unless it is clear that

the action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928) (citations omitted).

There is nothing in the ordinance or in the record that indicates that the setback and side yard requirements are an unreasonable or arbitrary classification. Indeed, the zoning ordinance permits mushroom plants with their attendant and unavoidable use of manure compost, in all areas of the Township, including the single residential area, subject only to the modest

building envelope requirements. Petitioners could have met these requirements simply by placing the additional structures elsewhere on the property, which consists of over eight (8) acres and which has only ten percent (10%) building coverage.

Petitioners rely on State of Washington, ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) where the Court struck down a zoning ordinance that permitted homes for the elderly or for children, but only after the written permission of two-thirds of the nearby property owners was obtained. The issue in that case, however, was the delegation of

authority to the property owners, who, in the absence of any legislative standard or rule, could arbitrarily or capriciously withhold consent to construct a building which the legislative body had already implicitly found to be in harmony with the public welfare. The issue of delegation of legislative authority is not relevant in the present case and petitioners' reliance on Roberge is misplaced.

In short, the instant case is an undistinguished zoning case which does not merit this Court's attention. On the same constitutional question that petitioners here raise, the Pennsylvania Commonwealth Court, an intermediate-level appellate court which

hears all appellate zoning cases, unequivocably sustained the validity of the questioned setback requirements. Had the Pennsylvania Supreme Court determined that petitioners' argument had colorable merit, or that the Commonwealth Court had misapplied the Eller decision, it would have granted the petitioners' Petition for Allowance of Appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that no important question of conflict of decisions is involved in the instant case, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Date: June 20, 1978